Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 87-396

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ILLINOIS STATE BOARD OF EDUCATION, and TED SANDERS, STATE SUPERINTENDENT OF EDUCATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT THIRD DISTRICT

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QUESTIONS PRESENTED

I. Whether the Illinois Appellate Court decision, that the Illinois State Board of Education is without authority to withhold state funds from a local school district based on the State Board's unilateral finding of racial discrimination, is inconsistent with the federal Equal Educational Opportunities Act of 1974.

II. Whether the Fourteenth Amendment to the United States Constitution authorizes the Illinois State Board of Education to withhold state funds from a local school district based on the State Board's unilateral determination that racial discrimination exists, when neither state nor federal statute authorizes the State Board's action.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

The Petitioner quotes the Supremacy Clause as a "Constitutional Provision Involved". The Supremacy Clause is not pertinent to this appeal as no conflict exists between federal and state law.

United States Statute

This case involves section 1706 of the Equal Educational Opportunities Act, 20 U.S.C. §1706, which provides:

> "An individual denied an equal educational opportunity, as defined by this sub-chapter, may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

ADDITIONAL STATEMENT

The Illinois State Board of Education and its Superintendent (hereinafter the "ISBE") repeatedly refer in their Petition to "intentional segregation" on the part of Respondent, the Board of Education of the City of Peoria (the "Peoria District"). In fact, no judicial, administrative, or other tribunal ever has made any finding that the Peoria District operates its gifted program in a manner that is racially discriminatory, whether intentional or otherwise. The Peoria District vigorously disputes that the alleged discrimination exists.

This claim arose when the State Superintendent of Education denied the Peoria District's annual application for state funds to sustain its gifted program. The Superintendent's letter denying the application noted that minorities were

"under-represented" in the Peoria gifted program, and that neutral selection criteria with a discriminatory impact are violative of black children's rights to participate in educational programs. Aside the Superintendent's comments, the only references in the record to intentional discrimination or segregation appear in the arguments or affidavits of the ISBE's counsel.

The Peoria District sued the ISBE alleging that the ISBE had no authority to withhold funding based upon the ISBE's determination that racial discrimination existed in the admission of students to the gifted program. The trial court granted summary judgment on this point in favor of the Peoria District and the Illinois Appellate Court affirmed. The Illinois Supreme Court denied the ISBE's Petition for Leave to Appeal.

SUMMARY OF ARGUMENT

The ISBE and the Peoria District disagree concerning the method by which students should be admitted to the Peoria District's gifted program. The ISBE asserts that the students are selected in a racially discriminatory manner. The Peoria District denies that they are so selected. No judicial or administrative tribunal has ever considered, much less determined, whether the Peoria District discriminates on the basis of race. The ISBE has nevertheless withheld funding appropriated by the Illinois legislature for the Peoria District's program. Neither the Equal Educational Opportunities Act of 1973 ("EEOA") nor the Fourteenth Amendment permits a state level educational agency to withhold funding based upon a unilateral determination of racial discrimination.

ARGUMENT

THE ISBE HAS NO AUTHORITY, UNDER EITHER STATE OR FEDERAL LAW, TO MAKE A UNILATERAL DETERMINATION THAT RACIAL DISCRIMINATION EXISTS AND TO WITHHOLD FUNDING ON THAT BASIS.

INTRODUCTION

The ISBE's Petition is based upon the assumption that the Peoria District's gifted program intentionally discriminates on the basis of race. The ISBE asks this Court, as it asked all lower courts, to make this assumption. All lowers courts refused to indulge in the assumption as there has never been a determination in any tribunal that the Peoria District discriminates on the basis of race.

The ISBE claims, based upon its own investigation, and nothing more, that racial discrimination exists. The Peoria District denies that racial discrimination

exists.[1] The issue is not whether the ISBE may withhold funding from a district which improperly discriminates. The issue is whether the ISBE may withhold funding from a district where there is a dispute as to whether the district discriminates and where there has been no determination in any tribunal that discrimination exists.

The Peoria District's Complaint alleged that the admission criteria to its gifted program were "racially neutral and academically specific". The Peoria District alleged that the ISBE refused funding because of the ISBE's own determination that the gifted program improperly discriminated. Former State School

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[1] In its complaint, the Peoria District alleged that it followed ISBE regulations governing the admission of students to the gifted program. R.C. 1 et seq.

Superintendent, Donald Gill, in his letter of October 1, 1984 to the Peoria Superintendent, Harry Whitaker, explained that funds were being withheld from the Peoria District even though the standards used for admission employed "apparently neutral selection criteria..." Mr. Gill stated:

> "It has been the position of the State Board of Education that programs which employ apparently neutral selection criteria but whose impact is discriminatory are violative of the rights of black children to participate in all of the School District's educational programs. Disparate impact is a legitimate test to determine if the policies of a Board of Education are discriminatory." R.C. 31.

The ISBE and the Peoria District both agree that admission to the gifted program must be free of racial discrimination. The ISBE and the Peoria District simply disagree as to the method to be employed in selecting gifted pupils. The sole issue is whether the ISBE has the authority to unilaterally determine that the

Peoria District was guilty of racial discrimination and withhold funds based upon that determination. The Illinois courts correctly held that the ISBE does not have the authority it now seeks. The decision of those courts should stand.

A. ILLINOIS LAW DOES NOT AUTHORIZE THE WITHHOLDING OF FUNDS BY THE ISBE.

Although the ISBE refers to state law, it is not argued that the ISBE's authority to withhold funding is authorized by state law. The Illinois courts have determined that the ISBE had no authority under state law to withhold funding and this decision is conclusive. International Longshoremen's Association, AFL-CIO v. Davis, 106 S.Ct. 1904, 1910 (1986).

B. ILLINOIS LAW, NOT FEDERAL LAW, DETERMINES WHETHER THE ISBE MAY UNILATERALLY WITHHOLD STATE FUNDING BASED UPON UNPROVEN CHARGES OF RACIAL DISCRIMINATION.

The ISBE argues that an action not authorized by state law was nevertheless mandated by federal law. The record is replete, however, with admissions by the ISBE that its authority is derived from the Illinois Constitution and Illinois statute. For example, paragraph 3 of the Affidavit of former State Superintendent, Donald Gill provides:

> "The Illinois State Board of Education is a division within the executive branch of the government of the State of Illinois. The Illinois State Board of Education was created by Article X, Section 2 of the 1970 Illinois Constitution. The Illinois State Board of Education operates pursuant to the authority granted to it by the 1970 Illinois Constitution and under the authority of the School

Code, Ill. Rev. Stat., 1983, Ch. 122, Section 1-1, et seq." (R.C. 27)[2]

The record contains uncontradicted admissions that the ISBE's authority emanates from state law.

In McNeese v. Board of Education, 373 U.S. 668 (1963), this Court recognized that the issue of whether the Illinois State Superintendent had authority to withhold funding from a local district was a matter of state, not federal law. Under Illinois law, a local district is required to file with the State Superintendent, as a prerequisite for obtaining state aid, an affidavit that the district does not discriminate on the basis of race. Ill. Rev. Stat., Ch. 122, Section 18-12. The

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[2]For other admissions that the ISBE's authority is derived from state law see R.C. 38 and paragraph 4 of Answer at R.C. 101, "The Defendant, ISBE further states that its powers and duties are defined by the 1970 Constitution of the State of Illinois and by State statute."

McNeese Court questioned whether the State Superintendent would certify a district for state aid if he determined that the affidavit was false. The McNeese court stated:

> "Apparently no Illinois cases have held that the Superintendent has authority to withhold funds once he has received an affidavit from the district, even if he determines that the affidavit is false." 372 U.S. at 676 (1963).

The McNeese court specifically recognized that where there is a dispute between the State Superintendent and a local district as to whether a local district unlawfully discriminates, the issue of whether the State Superintendent had authority to withhold state funding was a matter of state, not federal law.

C. THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974 DOES NOT AUTHORIZE THE WITHHOLDING OF FUNDS BY THE ISBE.

Assuming federal law is considered, it does not grant the ISBE the authority it seeks. Nothing in the EEOA authorizes the action of the ISBE. The EEOA merely provides as an educational agency, in exercising authority granted it, must not exercise that authority in such a manner as to deny an individual an equal educational opportunity. The EEOA does not expand the authority of the state educational agency over what it perceives to be discrimination within a local district. As the Court of Appeals correctly noted in Board of Education v. Illinois State Board of Education, 810 F.2d 707, 713 (7th Cir. 1986), the authorities cited by the ISBE:

> "[m]erely stand for the proposition that a state board of education is a proper party defendant when the plaintiff alleges that its failure to fulfill its responsibilities under

state law has produced non-compliance with the EEOA."

The EEOA provides that educational agencies shall not deny individuals an "equal educational opportunity". The EEOA grants a right to sue to specific individuals. Section 1706 of the EEOA provides:

> "An individual denied an equal educational opportunity, as defined by this sub-chapter, may institute a civil suit in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this Chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

Nothing in the EEOA provides that a state level educational agency has the unlimited discretion to determine where and when discrimination exists and to withhold funding based upon that determination. The sole authority to enforce the EEOA is placed in the Attorney General of the

United States and those denied an equal educational opportunity.[3]

Had Congress wished to empower a state level educational agency with authority to withhold funding, it would have enacted a specific provision in the EEOA to that effect. Where Congress wished to allow an agency to withhold funding as a remedy for violation of a statute, Congress did so specifically. For example, 20 U.S.C. §1416 authorizes the Secretary of Education to withhold federal funds from a state or local educational agency where the agency has violated the Education for the Handicapped

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[3]The issue of whether the ISBE has standing or capacity to enforce the EEOA is addressed at length in Board of Education v. Illinois State Board of Education, 810 F.2d 707 (7th Cir. 1987), petition for cert. filed June 16, 1987, no. 86-2028. The Court of Appeals concluded the ISBE had neither standing nor capacity to sue to enforce the EEOA.

Act. (20 U.S.C. §1400 et seq.) The Secretary of Education may withhold the funds only "after reasonable notice and opportunity for hearing. . ." No comparable provision exists under the EEOA authorizing a state level educational agency to withhold funds. The absence of such a provision confirms that Congress did not intend that the ISBE have the authority it now seeks.[4]

The remedies sections of the EEOA nowhere authorize the action taken by the ISBE. 20 U.S.C. §1712 provides that only those remedies "essential to correct particular denials of equal educational

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[4]Another example of an express Congressional grant to withhold funding is provided in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6065. See also United States v. Mattson, 600 F.2d 1295, 1299 (9th Cir. 1979). Furthermore, the funds here in dispute are state funds, not federal funds. Congress might not be able to control their distribution had Congress sought to do so.

opportunity" shall be employed. 20 U.S.C. §1713 lists the alternative remedies. Such remedies may be employed only after a finding of liability. The ISBE, without a finding of liability, has employed the most drastic of remedies, a complete cutoff of funding. Congress obviously never intended to endow the ISBE with such authority.

Furthermore, in the cases cited by the Defendants, the authority granted the various state boards differed markedly from that granted the ISBE. For example, in two cases involving Ohio school boards; Reed v. Rhodes, 662 F.2d 1219 (6th Cir. 1981) and Penick v. Columbus Board of Education, 583 F.2d 787 (6th Cir. 1978), aff'd. 443 U.S. 449 (1979), the Sixth Circuit held that the Ohio State Board of Education had a duty under state law to withhold funding from local districts which discriminated. That the Sixth

Circuit looked to state law to determine the extent of the state board's authority is clear from the following:

> "The crucial consideration here concerns the powers and duties of the State Board. The parties agree that in 1956, as noted by the District Judge, the Attorney General interpreted this Ohio law as giving the State Board the power to withhold state funds from any school board which was operating an unlawfully segregated school system. The parties also appear to agree that this opinion (written by the present Chief Justice of the Ohio Supreme Court) is law which controls the State Board." Penick v. Columbus Board of Education, 583 F.2d 787, 817 (6th Cir. 1978).

In Illinois the local school districts are obligated and empowered to combat segregation while the State Board of Education has only limited authority to act in this area. See Aurora East Public School District v. Cronin, 92 Ill.2d 313, 442 N.E.2d 511 (1982).

Assuming, arguendo, that a state board of education is authorized to withhold funds from a local district,

there must first be a determination that the district improperly discriminates. None of the ISBE's authorities support its position that a state board may withhold funding from a local district based upon the state board's own finding of discrimination. On the contrary, the ISBE's authorities confirm that unilateral action may not be taken. In all of the cases cited, a state board was enjoined from providing aid to a local district only if there were a judicial or administrative determination that the district improperly discriminated. For example, in Penick v. Columbus Board of Education, 583 F.2d 787 (6th Cir. 1978), the Court referred to an Ohio Attorney General's opinion applying state law to determine whether a state board could withhold funds. The Attorney General's opinion, however, clearly provides that the withholding could be done only after an administrative

proceeding was conducted. The Attorney General's opinion provides in part:

> "It is the responsibility of the State Board of Education in the first instance to determine whether a particular school district, or the board of education of such district, 'has not conformed with the law' so as to require the withholding of state funds from such district. In making such a determination, the State Board of Education should observe the requirements of Administrative Procedure Act, Ch. 119, Rev. Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally." 583 F.2d at 817, footnote 9.

The EEOA provides no support for the ISBE's action. A state level educational agency is not permitted under the EEOA to withhold state funding. Assuming, arguendo, the existence of such authority, it could not be done without any form of notice or hearing.

D. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT AUTHORIZE THE WITHHOLDING OF FUNDS BY THE ISBE.

The ISBE fails to distinguish between whether it has a right to unilaterally withhold funding and whether a third party, such as a student, has a right to file suit to enjoin funding of a discriminatory program. Norwood v. D. L. Harrison, 413 U.S. 455 (1973) merely held that aggrieved parties could sue to enjoin the enforcement of a state's textbook lending program to private schools which discriminated upon the basis of race. No injunction would be issued, however, without a judicial determination that the private schools discriminated. Here the ISBE has unilaterally imposed the injunction without the required finding of discrimination. The trial court, in his remarks at the hearing on the motion for

summary judgment, recognized the state board's lack of authority by stating:

> "You (the ISBE) have the right at any time to file - to accuse the local district at any time if you follow your own procedures set forth in the law, you can make it a State Court issue as to whether or not there is discrimination in the gifted program. The question is whether or not you have a duty to pay before you prove the discrimination. You want the local district to be guilty without going to the trouble to prove up your case, and that's what this case is all about. You want to withhold funds without proving first that they discriminated and all they say is if you say we discriminate, prove it. Now that's where you are." (Tr. R. 66-67)

By withholding the funds the ISBE is, in effect, attempting to assert the rights of the students under the EEOA and under the Fourteenth Amendment. It has already been determined that the ISBE has no standing or capacity to sue on behalf of the students under either the EEOA or the Fourteenth Amendment. Board of Education v. Illinois State Board of Education, 810 F.2d 707 (7th Cir. 1987). Under the EEOA,

only those denied an "equal educational opportunity" and the Attorney General of the United States are authorized to file suit. 20 U.S.C. §1706. In limited situations a party may assert the civil rights of another. The Attorney General of the United States is often permitted to sue to enforce the rights of others. This may be done, however, only if authorized by statute. United States v. City of Philadelphia, 644 F.2d 187, 201 (3rd Cir. 1980); United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979).

No statutory authority authorizes the ISBE to sue to enforce the rights of the students under either the EEOA or the Fourteenth Amendment. The ISBE has nevertheless attempted to assert those rights by unilaterally withholding funding. It would be incongruous to hold that the ISBE had no standing to assert the EEOA or Fourteenth Amendment rights of the

students and, at the same time, hold that the ISBE could seek to enforce those rights by arbitrarily withholding state funds.

It must be stressed that there has never been a determination in any administrative or judicial proceeding that the Peoria District's gifted program discriminates on the basis of race. The ISBE asks this Court to assume that it does. The only support for this assumption is that the ISBE's determination that the program so discriminates. Based upon this determination, the ISBE refused to release state funds. The Appellate Court correctly noted that the ISBE:

> "[a]dopted their own arbitrary measure for dealing with perceived segregation." Board of Education v. Sanders, 150 Ill. App.3d 730, 502 N.E.2d at 736 (3rd Dist. 1986).

The trial and Appellate Courts were clearly correct that the ISBE had no

authority, under either state or federal law, to summarily withhold funding.

The implications of a ruling in the ISBE's favor are disturbing. Although the present case concerns funding only for a gifted program, the ISBE's position, if accepted, would apply to all educational programs of a local district. The Peoria District receives approximately 50% of its total revenue through the ISBE. If the ISBE could summarily withhold funding from a local district based upon unproven charges of segregation, the ISBE could close a district whenever it disagreed with the district's approach to desegregation. Such a result would be disastrous to public education as it would place each district at the mercy of the state board's unlimited discretion.

The present case exemplifies the problems encountered by a local district in addressing the arbitrary action of the

ISBE. It has taken the Peoria District three years to seek redress in the courts. Other local districts may not have the tenacity nor the financial ability to fight the ISBE. If the ISBE is permitted to withhold funding without the necessity of first obtaining a determination that discrimination exists, the ISBE could impose its will upon a local district. This would be done in cases, such as this one, where a good faith dispute exists as to whether unlawful discrimination exists. There is nothing in state or federal law which grants the ISBE the unlimited and powerful discretion that it now seeks. The Illinois courts correctly determined that the ISBE had exceeded its authority and there is no basis for disturbing their holding.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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